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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	**CC Docket No. 96-128**
	)	
Policies and Rules Concerning Operator Operator Service Access and Pay Telephone Compensation	)	**CC Docket No. 91-35**

To: The Commission

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REPLY COMMENTS
OF
AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION
("ACTA")

These reply comments are filed on behalf of the 218 members of America's Carriers Telecommunication Association ("ACTA").

ACTA members have become concerned with the outcome of the complex issues raised by the Commission's entire payphone compensation scheme, especially since the complexity of the issues has been seriously aggravated by the judicial remand and by the polar differences in positions expressed in the initial comments filed in response to the Public Notice of August 5, 1997.[1] The concerns center on the potential for retroactive application of a revised compensation scheme.

[1] *Public Notice,* Pleading Cycle Established for Comment on Remand Issues in the Payphone Proceeding, DA 97-1673 (rel. Aug. 5, 1997).

Major IXCs argue for a cost-based approach to establish pre-call compensation levels. AT&T, for example, provides detailed cost information that, rather than the $0.35 per-call default figure adopted, a fair compensation figure is only about a third as large, namely $0.11.[2] ACTA members are concerned because: (1) they face potential retroactive exposure to a portion of the flat rate compensation for the first interim period (November 7, 1997 through October 6, 1997), but are unaware of the scope or basis of such exposure; (2) once a revised per-call rate is determined for the second year of the interim plan, all carriers will be responsible for paying compensation without exception, but the burden of doing so (AT&T argues for $0.11, while a Coalition of LECs argues for $0.42- $0.43)[3] is unknown and perhaps unknowable; (3) the facilities-based carriers responsible for making such payments are permitted to pass through their compensation payments to their reseller customers; and (4) after the second interim plan ends in 1998, all IXCs will be required to comply with yet another form of a compensation scheme.

Some parties commenting addressed the problems created by the Commission's determination that the remand did not require a suspension of the payment obligations it devised, but which were declared unlawful on judicial review.[4] It has been asserted that ignoring the logical implications that a rule or policy that has been declared invalid may not be enforced until corrected (and that such correction itself has been able to withstand court review), is itself arbitrary and capricious. ACTA finds merit in the criticism, but is even more certain that by ignoring the

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[2] Comments of AT&T at 6 et seq.

[3] Comments of the RBOC/GTE/SNET Payphone Coalition at 32, et seq.

[4] Comments of the Competitive Telecommunications Association (CompTel) at 4 et seq.

implications of the court's action by allowing the unlawful compensation scheme, nevertheless, to proceed is certain to exacerbate the confusion already existing and result in more serious economic distortion and financial strain, if not significant harm, to those companies which must bear the burden of the scheme.

ACTA argues that the Commission must be totally certain that it has given proper regard to the court's holding. ACTA submits that to do so, the Commission should hold in abeyance any attempt to enforce the compensation scheme, the lawfulness of which has been found lacking by the reviewing court. The risks, particularly to resellers, which are or which may be subjected to "pass-throughs" of the compensation paid by facilities-based carriers, and which will soon become subjected to direct compensation requirements, are immense.

At the outset, there is no way of ensuring that the information is available to determine what actual amounts of compensation passed through by the directly compensating IXCs are accurate and legitimate. Resources to effect true-ups do not exist, nor do resources exist to force the directly compensating IXCs to return excessive reimbursements or to avoid their resort to "service cut-off" tactics to coerce payments irrespective of the accuracy and fairness of the pass-throughs attempted or already exacted.

Clearly, much is at stake. On the one hand, it is argued that a fair compensation rate is $0.11 per-call; at the opposite end of the spectrum, a rate significantly above the FCC's own $0.35 per-call default rate is said to be proper.[5] While the "swing" in these allegedly "correct" per-call rates is itself significant, the burden is even more adversely weighted by the threat and reality of back billing

[5] Op. Cit. Supra, n. 2 and 3.

of these pass-throughs by the directly compensating IXCs. The correct procedure is to place a moratorium on payment schemes that differ from the existing $6.00 per phone, the scheme which existed prior to the Commission's actions in this docket.

In addition, no pass-through billing of an IXC's reseller customers should be permitted until a new compensation scheme is in place and all appeals thereof exhausted. In the event pass-through billing is permitted, at some point in the future, requirements should be established to ensure clear, fair and accurate billing which ensures that reseller customers will be able to perform audits and true-ups of the amounts being passed through and that there is no opportunity for double recovery or other undue exactions. Directly compensating carriers should not be permitted to threaten nor exact service termination for any legitimate disputes of any pass-throughs and should not be permitted to be the arbiter of what is a legitimate dispute.

ACTA is also concerned that the Commission will be unable to fulfill its duties under the Administrative Procedure Act of providing notice and comment on specific proposals to effect the cures required by the judicial remand. Fundamental issues need to be reconsidered and decided anew on the basis on which all IXCs will be made to participate in a revised compensation scheme. For example, the comments ACTA was able to examine failed to suggest an alternative to the use of toll revenues by which to determine each IXC's proportionate compensation obligations. If a new standard is selected without it having been first identified and proposed, those affected will not have been given the opportunity to receive notice and the time to analyze the standard and its impact and make comment thereon. Similar problems exist with other issues the judicial remand created. In short, the Commission has been returned to square one and the danger is that it refuses to recognize that fact and the legal implications it raises as to the options it has on how legitimately it may now proceed. In all of this, the duties to do so, in accordance with the Regulatory Flexibility Act ("RFA"), cannot be ignored, which only adds increased difficulties to the task at hand.

ACTA finds it difficult to foresee how, having chosen to act in so short a period, with minimum notice and little or no ability to consider and analyze new schemes and the issues related to their development, the Commission will be able to fashion a cure for the many knotty issues involved. While it is clearly not an optimal choice to stay any scheme until the issues can be examined and any new schemes noticed and commented upon, the Commission seems to have no other choice. For example, proper RFA analysis is impossible until a new scheme is devised which, if an interim compensation approach is retained, must announce both a new flat-rate and a new per-call rate, as well as a new standard for proportional contributions, factoring in the addition of carriers previously left our of the Commission's calculus -- small IXCs and LECs.

Given the incremental harm that would be caused by adopting a replacement scheme that is again appealed and, perhaps judicially stayed, the Commission may be well served by heeding the comment and observation that Congress set no time frame in Section 276 by which the Commission is to achieve the goals desired by Congress for increased payphone competition.[6] Another failed plan will not achieve securing the goal, but will only further delay its achievement. Nor should the Commission lose sight of the fact that so sweeping a change in industry structure and practice is seldom achieved promptly, even when Congress has directed action by a date certain as it did in regard to local interconnection, a goal which continues to languish as a result of the decision of another reviewing court.

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[6] Id. at 7.

In addition, ACTA supports Commission reliance, in the future, on the following principles set forth in the initial comments:

- A properly justified compensation amount, allocated among a properly defined class of payors, on the basis of a formula properly related to the number of access code and subscriber 800 calls received by each carrier, adopted pursuant to procedures in compliance with the Administrative Procedure Act.

- In adopting a revised policy on remand, the FCC may not impose a new scheme retroactively.

- Until it can be gauged whether or not payphone competition will develop in the absence of a market-based approach to determining compensation, a new compensation plan should focus on recovery of the PSPs' forward-looking direct costs associated with the origination of coinless calls.

- The revised plan should include ILECs among the group of payors.

Respectfully submitted,

AMERICA'S CARRIERS
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Dated: September 9, 1997

CERTIFICATE OF SERVICE

I, Suzanne M. Helein, a secretary in the law offices of Helein & Associates, P.C., do hereby state and affirm that I have caused copies of the foregoing "Reply Comments of America's Carriers Telecommunication Association ("ACTA")," in CC Docket Nos. 96-128 and 91-35, to be served in the manner indicated, on this 9th day of September, 1997, upon the following:

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